A

Mahmud bin Hassan & Anor v CIMB Bank Bhd

B HIGH COURT (ALOR SETAR) — CIVIL APPEAL NO 22NCVC-78–10 OF 2014
CHAN JIT LI JC
29 JUNE 2017

C *Land Law — Lien — Lien holder's caveat — Plaintiff granted loan to third party borrower — Plaintiff entered lien holder's caveat on defendants' land — Plaintiff brought action against defendants pursuant to s 281 of the National Land Code ('the Code') — Defendants filed counterclaim for cancellation and removal of lien holder's caveat — Whether provisions of the Code required bank to*
D *secure judgment against defendants or third party borrower — Whether consent by defendants' duly appointed solicitor constituted valid consent for creating lien holder's caveats — Whether registrar's caveat took priority over lien holder's caveat — National Land Code s 281*

E CIMB Bank Bhd ('the plaintiff') brought the present action against the fourth, fifth, sixth and seventh defendants ('the defendants') pursuant to s 281 of the National Land Code ('the Code') seeking to secure judgment against the defendants for the sum of RM52,729,171.76. The plaintiff's case was that, the plaintiff had granted loan facilities to a company known as Ikaz Development
F Sdn Bhd ('Ikaz') for the purchase of land owned by the defendants ('the land'). As a security, lien holder's caveats were entered on the land. The plaintiff contended that the judgment was necessary for them to exercise their rights under s 281 of the Code. As against the present action, the fifth to seventh defendants filed joint counterclaim for the cancellation and removal of the lien
G holder's caveat. In addition to that, in counterclaim, the fifth defendant submitted that at the time the lien holder's caveat was lodged, there was a pre-existing registrar's caveat on the land and the bank did not challenge the validity of the said caveat. The defendants in defence contended that there was no privity of contract between the plaintiff and the defendants as the loans were
H between Ikaz and the plaintiff, and not between the plaintiff and the defendants. The defendants also submitted that the lien holder's caveats were invalid as the defendants-landowners themselves had never deposited or consented to the creation of the said caveats. The issues arose were: (a) whether the provisions of s 281 of the Code required the bank to secure a judgment
I against the defendants or the third party borrower in order for it to enforce lien holder's caveats; (b) whether the consent by the defendants' duly appointed solicitor, one Hussin Che Pa, constituted a valid consent for the purpose of creating the lien holder's caveats; and (c) whether the registrar's caveat took priority over the lien holder's caveats.

Held, dismissing the plaintiff's claim with costs of RM3,000; allowing the fifth defendant's counterclaim in part with costs of RM3,000; and dismissing the sixth and seventh defendants' counterclaim with costs of RM3,000:

(1) In fact and in law, the plaintiff was required to secure a judgment against Ikaz, the third party-borrower and not the defendants or landowners to enable it to enforce its rights under s 281(2) of the Code (see para 32).

(2) The defendants had never denied that Hussin Che Pa was their duly appointed solicitor in the sale and purchase agreement. It was this very solicitor who had knowingly surrendered the titles for the creation of the lien holder's caveats. In applying the case of *Waugh and others v HB Clifford & Sons Ltd and others* [1982] 1 All ER 1095 to the facts of the present case, the court found that the plaintiff was entitled to rely on Hussin Che Pa's purported authority to act on the defendants' behalf when he surrendered the titles to the plaintiff for the creation of the lien holder's caveat (see paras 34–36).

(3) Based on s 319 of the Code, the existence of the registrar's caveat clearly prohibited the registration of the plaintiff's lien holder's caveat. It followed that the plaintiff's lien holder's caveat was unlawfully registered (see para 38).

[Bahasa Malaysia summary

CIMB Bank Bhd ('plaintif') membawa tindakan ini terhadap defendan keempat, kelima, keenam dan ketujuh ('defendan-defendan') berikutan kepada s 281 Kanun Tanah Negara ('Kanun') memohon untuk menjamin penghakiman terhadap defendan-defandan bagi jumlah RM52,729,171.76. Kes plaintif adalah bahawa, plaintif telah memberikan kemudahan pinjaman kepada syarikat yang dikenali sebagai Ikaz Development Sdn Bhd ('Ikaz') bagi pembelian tanah yang dimiliki oleh defendan-defendan ('tanah tersebut'). Sebagai jaminan, kaveat pemegang lien dimasukkan ke atas tanah. Plaintif berhujah bahawa penghakiman adalah perlu untuk mereka melaksanakan hak mereka di bawah s 281 Kanun. Terhadap tindakan ini, defendan kelima hingga ketujuh memfailkan tuntutan balas bersama bagi pembatalan dan pemotongan kaveat pemegang lien. Selanjutnya, dalam tuntutan balas, defendan kelima berhujah bahawa pada masa kaveat pemegang lien dimasukkan, terdapat kaveat pendaftar yang wujud terlebih dahulu ke atas tanah dan pihak bank tidak mencabar kesahan kaveat tersebut. Defendan-defendan dalam membela berhujah bahawa tidak terdapat priviti kontrak di antara plaintif dan defendan-defendan kerana pinjaman adalah di antara Ikaz dan plaintif, dan bukan di antara plaintif dan defendan-defendan. Defendan-defendan juga berhujah bahawa kaveat pemegang lien adalah tak sah kerana defendan tuan punya tanah sendiri tidak pernah mendepositkan atau bersetuju kepada pembentukan kaveat tersebut. Isu-isu yang berbangkit adalah: (a) sama ada peruntukan s 281 Kanun memerlukan bank untuk menjamin penghakiman

terhadap defendan-defendan atau pihak ketiga peminjam untuknya menguatkuasakan kaveat pemegang lien; (b) sama ada persetujuan oleh peguam yang dilantik oleh defendan-defendan, seorang yang bernama Hussin Che Pa, membentuk persetujuan sah bagi tujuan membentuk kaveat pemegang lien; dan (c) sama ada kaveat pendaftar lebih penting daripada kaveat pemegang lien.

Diputuskan, menolak tuntutan plaintif dengan kos sebanyak RM3,000; membenarkan sebahagian tuntutan balas defendan kelima dengan kos sebanyak RM3,000; dan menolak tuntutan balas defendan keenam dan ketujuh dengan kos sebanyak RM3,000:

(1) Dari segi fakta dan undang-undang, plaintif dikehendaki untuk menjamin penghakiman terhadap Ikaz, peminjam pihak ketiga dan bukan defendan-defendan atau tuan punya tanah untuk membolehkan ia menguatkuasa haknya di bawah s 281(2) Kanun (lihat perenggan 32).

(2) Defendan-defendan tidak pernah menafikan bahawa Hussin Che Pa adalah peguam yang dilantik oleh mereka dalam perjanjian jual beli tersebut. Peguam ini lah yang telah dengan sengaja menyerahkan hakmilik bagi pembentukan kaveat pemegang lien. Dalam mengguna pakai kes *Waugh and others v HB Clifford & Sons Ltd and others* [1982] 1 All ER 1095 kepada fakta kes ini, mahkamah mendapati bahawa plaintif berhak bergantung ke atas kuasa Hussin Che Pa yang dikatakan untuk bertindak bagi pihak defendan-defendan apabila dia menyerahkan hakmilik kepada plaintif bagi pembentukan kaveat pemegang lien (lihat perenggan 34–36).

(3) Berdasarkan s 319 Kanun, kewujudan kaveat pendaftar jelas melarang pendaftaran kaveat pemegang lien plaintif. Oleh itu kaveat pemegang lien plaintif didaftarkan secara salah (lihat perenggan 38).]

Notes

For cases on lien holder's caveat, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4100–4102.

Cases referred to

Dato Joseph Chong Chek Ah & Anor v Amcard Services Berhad (dahulunya dikenali sebagai Arab-Malaysian Credit Berhad) [2016] MLJU 1383; [2017] 6 CLJ 151; [2016] 1 LNS 1460, CA (refd)

Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals [2008] 2 MLJ 622; [2008] 2 CLJ 121, FC (refd)

Waugh and others v H B Clifford & Sons Ltd and others [1982] 1 All ER 1095, CA (folld)

Legislation referred to

National Land Code ss 281, 281(2), 319

Jannu bt Babjan (Chamber of Jannu Babjan) for the appellants.
Subramaniam a/l Anjan (Oazir bin Hunied Tyeb with him) (Sharizat Rashid & Lee) for the respondent.

Chan Jit Li JC:

[1] The plaintiff, CIMB Bank Bhd, is a bank. There is no challenge to its locus to institute the present case. This is material for the basis of this cause of action occurred during the management of another financial institution, Cempaka Finance Bhd. However, by a series of vesting orders, the bank is now cloaked with the locus to institute the present action.

[2] Seven defendants were cited in this action, namely, Othman bin Musim ('the first defendant'), Azimat bin Md Zain ('the second defendant'), Ismail bin Ishak ('the third defendant'), Kamaruddin bin Said ('the fourth defendant'), Che Zan bt Said ('the fifth defendant'), Che Zan bt Said and Mahmud bin Hassan as the administrators of the estate of Hasan bin Talib (deceased) ('the sixth defendant') and Rabiah bt Mat Isa ('the seventh defendant').

[3] However, on the date of the trial, Mr A Subramaniam learned counsel for the plaintiff who was assisted by Encik Oazir bin Hynied Tyeb informed the court that the plaintiff would be proceeding only against the fourth to the seventh defendants as the land belonging to the other defendants had been dealt with.

[4] The fourth defendant, Kamaruddin bin Said ('Kamarudin'), is the administrator of the estate of Said bin Ali (deceased) of which the land held in HS(M) 2973 lot 1752 Mukim Bandar Kuah, Bkt Bt Hampar, Langkawi (previously known as HS(M) 322, GM 253 Mukim Bandar Kuah, Bukit Batu Hampar, Langkawi) ('Said's land') is part of the estate.

[5] Che Zan bt Said ('Che Zan') appears in two capacities. She is named as the fifth defendant by reason of the fact that she holds 32/72 of the land held in HS(M) 1354 lot 1978 previously known as No HS(M) 16-86, Mukim Bandar Kuah, Bkt Bt Hampar, Langkawi ('Hassan's land') on trust for the minors Che Natrah bt Said and Che Sopiah bt Said; and as the sixth defendant by virtue of the fact that she and one Mahmud b Hassan are co-administrators for the estate of Hassan bin Talib (deceased).

[6] Che Zan is the daughter of one Rabiah bt Mat Isa ('Rabiah'), the seventh

A defendant. Rabiah is also a co-owner of Hassan's land to the extent of 9/72 share.

[7] The bank's cause of action is premised on s 281 of the National Land Code ('the NLC').

B

[8] All the defendants have filed their respective statements of defence. However, in addition to their defence, the fifth to the seventh defendants have also filed a joint counterclaim. The chief relief sought in their counterclaim is the cancellation and removal of the lien holder's caveat.

C

[9] The bank called only one witness. The said witness is one Encik Ishak bin Tuan Yaacob (PW1) who is its Vice President, Special Portfolio Management, Corporate & Commercial Recovery Division.

D

[10] Kamaruddin, the fourth defendant (DW1), testified on his own behalf. His learned counsel is En M Fairus.

E **[11]** The fifth to the seventh defendants are represented by Miss Jannu Babjan. Their witnesses are Che Zan (DW2) and Rabiah (DW3).

[12] From the evidence adduced in court, I gather that the following events took place.

F

[13] Sometime in 1996 a company by the name of Ikaz Development Sdn Bhd ('Ikaz') applied to Cempaka Finance for two bank loans. The first loan was RM4m whilst the second loan was for RM7.5m. Both these loans were for the purpose of purchasing 14 parcels of land in Langkawi. These land are the subject matter of the present dispute. Cempaka Finance had approved the loans subject to the condition that a lien holder's caveat be created in its favour over all these 14 pieces of land. Hasan's land fell in the first parcel of land used to secure the first loan, while Said's land was in the other parcel of land which secured the second loan.

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H

[14] There is no dispute that Cempaka Finance released the loan funds to Ikaz.

I **[15]** Ikaz defaulted in the repayments. It was wound up on 6 March 2009 and the Department of Insolvency has been appointed as its provisional liquidator. It is PW1's evidence that two judgments have been obtained against Ikaz; the judgment for the RM4m loan on 14 March 2002 and the judgment for the RM7.5m on 28 March 2002. However, the judgment was never tendered to the court. Instead, PW1 relies on a document produced and

tendered as exh P22. Exhibit P22 is a statement of accounts which contains an entry that states that the judgment had been secured. It is unclear why the bank resorted to this manner of adducing evidence of the judgment. But PW1 did explain that due to the multiple mergers, the bank faced difficulties in locating both Cempaka Finance's original officers and documents.

[16] The defendants share a common tale. It all started when Ikaz offered to purchase the 14 pieces of land. Both Said and Hassan had agreed to sell. Hassan who was then alive had informed Che Yan and Rabiah of his intention and as he was their grandfather and father-in-law respectively, both Che Yan and Rabiah fell in with his decision to sell.

[17] Having decided to sell, they appointed a solicitor from the legal firm of Messrs CP Hussin & Co by the name of Hussin Che Pa to act for them in the sale and purchase transaction. They were instructed by Hussin Che Pa to deposit the original land titles with him as the documents were necessary for the sale. They complied and on 6 December 1995 a sale and purchase agreement was duly executed between Ikaz and the defendants and the rest of the landowners of the remainder land.

[18] The defendants admit receipt of the initial 10% of the agreed purchase price. Thereafter, they did not hear anything from Ikaz and thought that Ikaz had changed its mind about the purchase. They took the view that they were entitled to retain the 10% deposit and at the same time sought to regain possession of the titles. However, they failed as at the legal firm's office Hussin Che Pa refused to meet them and his staff were hostile. They then left the matter at that and only knew of the lien holder's caveats when the bank instituted the present action against them.

[19] Hussin Che Pa was not made a party to this action. Neither was he called as a witness.

[20] As the trial unfolded, it became apparent that the deposit of the 14 titles and the creation of the lien holder's caveats on these land in favour of Cempaka Finance was actively facilitated and with the knowledge of Hussin Che Pa. This is evident from the correspondence of Messrs Abu Zahar Syed Mohd Fuad & Partners, the then solicitors for Cempaka Finance. Two of the correspondence merit reproduction here.

[21] The first letter of 22 October 1996 (exh P17) appears as follows:

Bilangan Tuan: KL/FL/96/08/0069

Bilangan Kami: C/1781/96/CFB/4/RC/CH

Tarikh: 22nd October 1996

Cempaka Finance Berhad

3rd Floor Wisma TAS

21 Jalan Melaka

50100 Kuala Lumpur

BY FAX/POST

Attention: Miss Sally Wong

Dear Madam

Re: Fixed Loan Facility of RM7.5 Million

Favouring IKAZ DEVELOPMENT SDN BHD

With reference to the above, we enclose herewith the following documents for your retention:-

a) the original stamped Loan Agreement dated 15th October 1996;

b) the original stamped Guarantee Agreement dated 15th October 1996;

c) the stamped Duplicate Copy of the Power of Attorney dated 15th October 1996 (the original has been sent for registration at the High Court. Upon completion of registration, we will forward you the original);

d) a copy of our Search on the Company; and

e) a copy of the latest Form 24 of the Company

We have requested a fresh Director's Resolution from the Company in order to incorporate the additional 14th land title put up by the Company as security for the loan. We have also prepared Form 34 under the Companies Act, 1965 and shall revert to you again upon receipt of Form 40 (Certificate of Registration of Charge).

We confirm that the Lien Holder's Caveat in your favour over all the 14 pieces of land in the Mukim of Kuah, Daerah Langkawi had been presented for registration on the 19th day of October 1996 via Jilid 1, Folio 44. A copy of the Official Receipt from the Land Office is enclosed herein for your reference and retention.

In the circumstances, we confirm that save and except for the Charge in your favour over the said lands, all legal and security documents have been duly completed, and to the best of our knowledge your interest is rightly secured and that the loan facility may be made available for drawdown by the Borrowers.

In the meantime, kindly acknowledge receipt of the above said documents by signing and returning the duplicate copy of this letter.

Thank you.

Your sincerely

For Abu Zahar, Syed Mohd Fuad & Partners

.....

Nik Azli bin Dato' Abu Zahar

encls

cc

Ikas Development Sdn Bhd

Perpetual 99

Jalan Raja Muda Abdul Aziz

50300 Kuala Lumpur

NA/nk

IKAZ DEVELOPMENT SDN. BHD

Perpetual 99

Jalan Raja Muda Abdul Aziz

50300 Kuala Lumpur *By fax / Hand*

(Attn: Encik Kasmani b. Haji Abu Hassan)

EN KASMANI BIN HAJI ABU HASSAN

No 84, Jalan Seri Meranti

Taman Bukit Chedang

70300 Seremban *By AR Registered*

Negeri Sembilan

TETUAN CP HUSSIN & CO

Lot 99 (First Floor)

Jalan Pandak Mayah 5, Kuah

07000 Langkawi *By fax/Hand*

Kedah Darul Aman

(Emphasis added.)

[22] The second letter, that of 17 January 1998 (exh P18), appears as follows:

Bilangan Tuan: KL/FL/96/08/0069

Bilangan Kami: C/1781/96/CFB/4/RC/CH(NAZ)

Tarikh: January 17, 1998

Cempaka Finance Berhad

(Kuala Lumpur Branch)

Podium Floor Wisma TAS

21 Jalan Melaka

50100 Kuala Lumpur

By Fax / Post

Attention: Cik Zarina

Dear Madam

Re: Fixed Loan Facility of RM7.5 Million

Favouring IKAZ DEVELOPMENT SDN BHD

The above and the recent telephone conversation between your Cik Zarina and our Encik Nik Azli is hereby referred.

2. Kindly be informed that the *Vendor's Solicitor, M/s CP Hussin & Co* of Langkawi have confirmed with us that they are forwarding the Title Deeds to the fourteen (24) properties to us via Courier today, Saturday, 17th January 1998. We predict that the Titles would reach us by Tuesday of Wednesday next week. Upon receiving them, we shall forward them to you immediately.

Thank you.

Yours sincerely

For Abu Zahar, Syed Mohd Fuad & Partners

(NIK AZLI BIN ABU ZAHAR)

cc

M/s CP Hussin & Co

Advocates & Solicitors

1st Floor, Jalan Pandak Mayah 5

Langkawi

Kedah Darul Aman

(*Attention : Tuan Hj Hussin Bin Che Pa*) By Fax / Post

(Emphasis added.)

[23] Against this backdrop, the bank seeks to secure judgment against the defendants for the sum of RM52,729,171.76 as at 30 April 2013 together with interest at 5%pa from the date of filing to full settlement. Learned counsel for the plaintiff states that this judgment is necessary for the bank to exercise its rights under s 281 NLC.

[24] I note that learned counsel for the defendants share some common

arguments in their contest of this claim. They contend that this claim must fail in that there is no privity of contract between the bank and the defendants. The loans were between Ikaz and the bank, and not between the bank and the defendants. The bank's claim was also barred by limitation. Ikaz's defaulted in making repayments. Cik Jannu submits that this contractual breach occurred on 30 August 1999. Thus the present action had to be instituted at the latest by 29 August 2012. However, the present action was instituted only in 2014. Lastly, the lien holder's caveats were invalid as the defendants-landowners themselves had never deposited or consented to the creation of the said caveats.

[25] After considering the arguments of the parties, I discern that the following issues requires consideration:

(a) do the provisions of s 281 of the NLC require the bank to secure a judgement against the defendants or the third party-borrower in order for it to enforce the lien holder caveats? and

(b) does the consent by the defendants' duly appointed solicitor constitute a valid consent for the purpose of creating the lien holder caveats?

And, in dealing with the defendants' counterclaim, I would have to consider a further issue: whether a registrar's caveat takes priority over a lien holder caveat?

Do the provisions of s 281 of the NLC require the bank to secure a judgment against the defendants or the third party-borrower in order for it to enforce the lien holder's caveats?

[26] The governing provision for a lien holder's caveat on which the bank rests its claim, is s 281 of the NLC. It provides as follows:

281 Creation, and effect, of liens.

(1) Any proprietor or lessee for the time being may deposit with any other person or body, as security for a loan, his issue document of title or, as the case may be, duplicate lease; and that person or body:

(a) may thereupon apply under Chapter 1 of Part Nineteen for the entry of a lien-holder's caveat; and

(b) shall, upon the entry of such a caveat, become entitled to a lien over the land or lease.

(2) Where the holder of any lien has obtained judgment for the amount due to him thereunder, he shall be entitled to apply to the Court for, and obtain forthwith, an order for the sale of the land or lease.

(3) Any such application shall be made in accordance with any law for the time being in force relating to civil procedure; and the provisions of sections 257 to 259 and sections 266 to 269 shall apply, *mutatis mutandis*, where any such application has been made as they apply where a chargee

applies for an order under section 256.

[27] The undisputed facts in this case are that the loans were given to Ikaz, the third party borrower; whilst the security in the form of the lien holder's caveats came from the defendants-landowners. Against whom then must the bank take judgment?

[28] A somewhat similar situation arose in *Dato Joseph Chong Chek Ah & Anor v Amcard Services Berhad (dahulunya dikenali sebagai Arab-Malaysian Credit Berhad)* [2016] MLJU 1383; [2017] 6 CLJ 151; [2016] 1 LNS 1460. In that case, Westmont Holdings Sdn Bhd ('Westmont') had taken credit facilities from the respondent. The first appellant ('Chong') had stood as guarantor for Westmont and when Westmont failed to repay the facilities, the respondent instituted action against them. Chong entered into a consent judgment. In spite of that, Chong still failed to repay the whole debt resulting in the respondent taking bankruptcy proceedings against him. A second settlement was made and at this second settlement the respondent was permitted to create a lien holder caveat over a semi-detached house in which Chong and the second appellant were joint owners. When Chong again failed to honour the settlement, the respondent pursuant to exercising its rights under s 281 of the NLC successfully obtained an order to sell the said house.

[29] On appeal, David Wong JCA delivering the decision of the Court of Appeal held (at p 154):

> [11] Learned counsel for the second appellant from the outset of his submission set out the issues which we needed to deliberate and they were these:
>
> (i) whether a lien holder caveatee may realise its asset without first obtaining a judgment of the court for the amount due to it under the lien?
>
> (ii) can a caveatee rely on a judgment entered into between the caveator and caveatee before the creation of the lien holder's caveat as the judgment required to be obtained under s 281(2) of the National Land Code?
>
> [12] We were agreeable to the stand taken by learned counsel for the second appellant, hence we determined the fate of the appeal by deliberating on those two issues.
>
> [13] Our starting point was s 281 of the National Land Code which provides as follows:
>
> (1) Any proprietor or lessee for the time being may deposit with any other person or body, as security for a loan, his issue document of title or, as the case may be, duplicate lease; and that person or body:
>
> (a) may thereupon apply under Chapter 1 of Part Nineteen for the entry of a lien holder's caveat; and

(b) shall, upon the entry of such a caveat, become entitled to a lien over the land or lease.

(2) Where the holder of any lien has obtained judgment for the amount due to him thereunder, he shall be entitled to apply to the Court for, and obtain forthwith, an order for the sale of the land or lease.

(3) Any such application shall be made in accordance with any law for the time being in force relating to civil procedure; and the provisions of ss 257 to 259 and s 266 to 269 shall apply, mutatis mutandis, where any such application has been made as they apply where a chargee applies for an order under s 256.

[14] Learned counsel for the second appellant in respect of issue (i) submitted that as there was no judgment obtained by the respondent against the second appellant, the respondent had not complied with s 281(2) which referred to 'the holder of any lien' having obtained judgment. Learned counsel took the position that until and unless the respondent obtained a judgment against the second appellant (which there was none), the respondent was barred from applying to the court to sell the property. With respect, s 281(2) speaks of the holder of any lien 'obtaining judgment for the amount due to him'. The operative phrase there simply is 'judgment for the amount due' which the respondent has obtained against the first appellant for the amount due, namely the consent judgment entered against the first appellant on 14 October 2004 in the sum of RM15,000,000. The aforesaid provision does not require judgment to be obtained against the second appellant.

[15] The second appellant is not a borrower of the respondent. However, that does not preclude her from providing security by way of a lien for the benefit of a third party debtor, that is, the first appellant in this case.

[16] Section 281 of the NLC, in other words, is not limited to the creation of a security by way of a lien on title only for the benefit of a registered proprietor. It extends to third party borrowers as well (per Gopal Sri Ram FCJ in *United Overseas Bank (Malaysia) Sdn Bhd v UJA Sdn Bhd & Another Appeal* [2009] 6 MLJ 857; [2010] 6 CLJ 204).

[17] *Nevertheless, as the second appellant is not a borrower of the respondent, there is no basis in law for the respondent to sue and obtain a judgment against her for the amount due. The respondent would have no cause of action against the second appellant.*

[18] It is sufficient for the purpose of s 281(2) of the NLC that the second appellant as co-proprietor had expressly consented to the creation of the lien over the property (see ex YCC pp 142–145 record of appeal Jld 2 Bah C).

[19] Our interpretation of s 281(2) of the NLC is also consistent with the views expressed by the learned authors in *Land Law In Malaysia, Cases and Commentary* (3rd Ed) by Teo Keang Sood and Khaw Lake Tee at p 729 (para 8.45):

> It may be noted, however, that it is not a prerequisite for the valid entry of a lien holder's caveat that the issue document of title or duplicate lease be deposited as security for a loan granted in favour of only the registered proprietor or lessee and not a third party. Such a requirement would unduly undermine the usefulness of a statutory lien as a form of security over land provided under the Code. All that

A is necessary under section 330(1) of the National Land Code is that before a lien-holder's caveat can be entered, the issue document of title or duplicate lease must have been deposited (by the registered proprietor or lessee) as security for a loan, whether or not granted in favour of them. It may also be noted that there is no requirement that the entry of the lien holder's caveat must be made B contemporaneously with the grant of the loan (*Heap Huat Rubber Co Sdn Bhd v United Overseas Bank Ltd* [above]).

[20] As for issue (ii), we answered in the affirmative as we saw no reason why a judgment entered prior to the creation of the lien holder's caveat cannot be used to enforce the same. (Emphasis added.)

C

[30] And, again in *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622; [2008] 2 CLJ 121, the Federal Court had granted leave to the parties to appeal on five D questions. The questions relevant to the instant case are:

1. ....
2. Whether ss 281(1) and 330 of the National Land Code ('the NLC') envisage that a registered proprietor of land may deposit his issue document of title as security for a loan only to the said proprietor and E never to a third party.
3. If a registered proprietor of land deposits his issue document of title as security for a loan to a third party, whether the judgment that is required to be obtained under s 281(2) of the NLC is a judgment to be obtained F against the borrower of the loan or against the registered proprietor of the said land.
4. Does s 281(1) of the NLC require as a condition precedent for validity of a lien holder's caveat that the registered proprietor do personally effect the deposit of his issue document of title or would the requirements of G s 281(1) of the NLC be satisfied by evidence that the said issue document of title had been deposited by a third party (ie, a person or party other than the registered proprietor) on the instructions or with the authorisation or the consent of the registered proprietor.
5. Is an order for sale made pursuant to a lien-holder's caveat created by the H deposit of the issue document of title by a third party with the consent of the registered proprietor considered to be illegal and consequently liable to be set aside.

[31] His Lordship Abdul Aziz Mohamad FCJ (as he then was) delivering the I judgment of the Federal Court held (at p 152):

[145] Subsection (1) of s 281 speaks of the registered proprietor depositing his issue document of title 'as security for a loan' but does not specify the borrower and neither does it restrict the loan to a loan to the registered proprietor. I could see no reason for construing the loan to mean only a loan to the registered proprietor. In

my judgment the loan may be a loan to a third party. That would have been my answer to Question No 2. *Where the loan is to a third party, it must follow that under subsection (2) the judgment obtained is a judgment against the third-party borrower.* That would have been my answer to Question No 3.

[146] Subsection (1) of s 281 is an enabling or empowering provision. It enables or empowers the registered proprietor to deposit his issue document of title with any person or body as security for a loan. It does not lay down the procedure for or the manner of depositing. It ought not to be construed as requiring that the registered proprietor himself must do the act of depositing. It is his will that is important. If he wills that the document of title be deposited with a person or body as security for a loan and it is so deposited, then it is he who has exercised his power under sub-s (1). He wills the depositing if he instructs or authorises it or consents to it, and the actual act of depositing may be done by someone else. That would have been my answer to Question No 4. It follows that my answer to Question No 5 would have been a negative one. (Emphasis added.)

[32] Therefore, based on the above authorities, I find that in fact and in law the bank is required to secure a judgment against Ikaz, the third party-borrower and not the defendants/landowners to enable it to enforce its rights under s 281(2) of the NLC.

Does the consent by the defendants' duly appointed solicitor constitute a valid consent for the purpose of creating the lien holder's caveats?

[33] It is the defendants' contention that their surrender of the title to Hussin Che Pa was for the purpose of selling the land but not a consent to the creation of the lien holder's caveats. They should, therefore, not be bound by the said caveats.

[34] I note from the evidence that the defendants have never denied that Hussin Che Pa was their duly appointed solicitor in the sale and purchase agreement. It was this very solicitor who had knowingly surrendered the titles to Cempaka Finance for the creation of the lien holder's caveats (paras 20 and 21 are referred). Do his acts then bind the defendants as against the bank?

[35] In *Waugh and others v HB Clifford & Sons Ltd and others* [1982] 1 All ER 1095, the facts were that the buyers had purchased houses from the builders. The buyers sued the builders after finding the buildings defective. In the course of the litigation, there was a proposal to settle the dispute by a repurchase of the buildings by the builders after a valuation was made by an independent valuer. The builder's solicitors informed the builders by way of a letter that in they will proceed as proposed unless they received instructions otherwise. The builders telephoned on 30 May to state that they were not agreeable. The instructions were not communicated to the solicitor in charge until 6 June. However, by that date the purchasers' solicitors had by writing

confirmed the acceptance of the proposal. When the builders refused to comply with the proposal, the purchasers instituted a second action seeking specific performance of the proposal. In dealing with the issue of a solicitors' authority, Lord Brightman LJ (as he then was) delivering the judgment of the Court of Appeal held (at p 1106):

> I think it would be regrettable if this court were to place too restrictive a limitation on the ostensible authority of solicitors and counsel to bind their clients to a compromise. I do not think we should decide that matter is 'collateral' to the action unless it really involves extraneous subject matter, as in *Aspin v Wilkinson* (1879) 23 SJ 388 and *Re a debtor* (No 1 of 1914) 2 KB 758. So many compromises are made in court, or in counsel's chambers, the solicitor but not the client being present. This is inevitably so where a corporation is involved. It is highly undesirable that the court should place any unnecessary impediments in the way of that convenient procedure. A party on one side of the record and his solicitor ought usually to be able to rely without question on the existence of the authority of the solicitor on the other side of the record, without demanding that the seal of the corporation be *affixed*; or that a director should sign who can show that the articles confer the requisite power on him; or that the solicitor's correspondence with his client be produced to prove the authority of the solicitor. Only in the exceptional case, where the compromise introduces extraneous subject matter, should the solicitor or counsel retained in the action be put to proof of his authority. Of course it is incumbent on the solicitor to make certain that he is in fact authorised by his corporate or individual client to bind his client to a compromise. In a proper case he can agree without specific reference to his client. But in the great majority of cases, and certainly in all cases of magnitude, he will in practice take great care to consult his client, and I think that his client would be much aggrieved if in an important case involving large sums of money he relied on his implied authority. But that does not affect his *ostensible* authority vis a vis the opposing litigant.

[36] In applying the law to the facts of the instant case, I find that the bank was entitled to rely on Husin Che Pa's purported authority to act on the defendants' behalf when he surrendered the titles to the bank for the creation of the lien holder's caveat

THE FIFTH DEFENDANT'S COUNTERCLAIM

[37] There is a distinguishing feature in respect of the fifth defendant's counterclaim. The bank does not dispute the following facts. The bank's lien holder's caveats were lodged only in 1996. At the time the lien holder's caveat was lodged, there was a pre-existing registrar's caveat on that portion of the land. The registrar's caveat had been lodged to protect the interests of the minor proprietors. The bank does not challenge the validity of this registrar's caveat.

[38] The effect of a registrar's caveat is clearly provided in s 319 of the NLC. The provision reads as follows:

319 Nature and effect of Registrar's caveats

(1) A caveat under this section shall be known as a 'Registrar's caveat', and —

(a) may be entered by the Registrar on the register document of title to any land in any of the circumstances specified in section 320;

(b) *subject to subsection (3), shall, so long as it continues in force, have the effect of prohibiting the registration, endorsement or entry on that document of —*

(i) any instrument of dealing;

(ii) any claim to the benefit of a tenancy exempt from registration; and

(iii) *any lien-holder's caveat.*

(2) The prohibition imposed by a Registrar's caveat shall apply to any such instrument notwithstanding that it was presented for registration before the caveat was entered, and to any such claim or lien-holder's caveat notwithstanding that the application for its endorsement or entry was received before that time.

(3) The Registrar may waive the said prohibition in any case where he is satisfied that to do so would not be inconsistent with the purpose for which the caveat was entered, but, in any other case, shall reject the instrument or, as the case may be, the application for endorsement or entry.

(4) On rejecting any instrument or application for endorsement pursuant to this section, the Registrar shall take the like steps as if he had rejected it pursuant to section 298 or, as the case may be, 317. (Emphasis added.)

The existence of the registrar's caveat clearly prohibits the registration of the bank's lien holder's caveat. It follows that the bank's lien holder's caveat was unlawfully registered. Therefore, the fifth defendant's counterclaim must be allowed.

[39] In conclusion, I make the following orders:

(a) the plaintiff's claim against the fourth, fifth, sixth and seventh defendants are dismissed with costs of RM3,000;

(b) the counter claim by the sixth and seventh defendants are dismissed with costs of RM3,000; and

(c) the fifth defendant's counter claim is allowed in respected of prayers 7(i), (ii) and (iii) with costs of RM3,000.

Plaintiff's claim dismissed with costs of RM3,0000; fifth defendant's counterclaim

allowed in part with costs of RM3,000; sixth and seventh defendants' counterclaim dismissed with costs of RM3,000.

Reported by Dzulqarnain Ab Fatar